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No. 82-394

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HISPANIC COALITION ON REAPPORTIONMENT, et al.,
Appellants

v.

LEGISLATIVE REAPPORTIONMENT COMMISSION, et al.,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION OF THE LEGISLATIVE REAPPORTIONMENT COMMISSION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellee the Pennsylvania Legislative Reapportionment Commission moves to affirm on the grounds that it is manifest that the questions on which the decision of this cause depends are not novel and are so unsubstantial as not to require further argument.

STATEMENT OF THE CASE

Pursuant to the mandate of the Constitution of the Commonwealth of Pennsylvania, the Legislative Reapportionment Commission exercises all legislative power with respect to reapportioning the legislative districts of the Commonwealth.[1] Thus, the Commission is a legislative body and its members are the Commonwealth's legislators for the purpose of reapportionment. The 1981 Final Reapportionment Plan adopted by the Commission has survived numerous attacks in the Supreme Court of Pennsylvania.[2] Moreover, it has withstood the scrutiny of the three-judge court below. [A-1]. It is respectfully submitted that the instant appeal from the rulings of that court raises no novel or substantial issues which require further argument before this Court.

The Commission is in substantial agreement with the chronology of events of the 1981 reapportionment process set forth in appellants' Jurisdictional Statement.[3] The instant appeal involves the 180th House of Representatives district established by the Commission. In the preliminary plan proposed by the Commission that district contained an Hispanic population of approximately fifteen percent. [A-7]. After receiving public comment on the preliminary plan, the Commission issued its final reapportionment plan in which the Hispanic population of the 180th district was increased to approximately forty percent [A-8]. This final reapportionment plan adopted by the Commission on October 13, 1981 is now the law of the Commonwealth of Pennsylvania.

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1. PA. CONST., Art. II, §17.

2. *In re Reapportionment Plan for the Pennsylvania General Assembly filed by the Legislative Reapportionment Commission, October 13, 1981*, 442 A.2d 661 (Pa. 1981).

3. Jurisdictional Statement at pp. 5-6.

ARGUMENT

The four questions advanced for review by appellants pose essentially two issues. The first concerns the conclusions to be drawn from appellants' evidence presented at trial. The second concerns the application of legislative immunity to bar appellants' inquiry of the Commission's Chairman, James O. Freedman, and to permit limited inquiry of Representative Robert O'Donnell.

In the lower court, the Commission moved to dismiss on the ground that as a legislative body it is totally immune from suit. The lower court, however, declined to rule on the Commission's motion, reasoning that ". . . where, as here, the case on the merits is weak, such a technical defense is less important to the litigation. . . ." [A-11]. In their Jurisdictional Statement, appellants now concede that ". . . the Commission is immune from suit . . ." on the basis of this Court's decision in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980). [Jurisdictional Statement at p. 9, n.8] . Accordingly, appellee will argue in the instant Motion to Affirm only that appellants' appeal, insofar as it questions the legislative immunity afforded Commission Chairman, James O. Freedman, does not present substantial or novel issues.[4]

The Commission exists for one purpose only — to enact a law of the Commonwealth of Pennsylvania.[5] To

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4. Motions to Affirm being filed simultaneously by appellees, William R. Davis and Representative Robert O'Donnell *et al.*, will address the merits of appellants' proof at trial and the legislative immunity afforded representative O'Donnell, respectively. The Commission joins in the Motion to Affirm being filed by appellee, William R. Davis.

5. Article II, Section 17(a) of the Constitution of the Commonwealth provides:

> (a) In each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Common-

perform this task, the Commission first files a Preliminary Plan. If no exceptions are filed, or if filed and acted upon, this plan automatically becomes final and has ". . . the force of law."[6] Otherwise, a final plan is filed from which appeal may be taken directly to the Supreme Court of Pennsylvania. After that court decides all appeals, or if no such appeals are taken, ". . . the reapportionment plan shall have the force of law . . ."[7] As such, the Commission was for all purposes a legislative body. *Supreme Court of Virginia v. Consumers Union of the United States, Inc., supra,* 446 U.S. at 734.[8]

As the Chairman of this legislative body, James O. Freedman was in all respects a legislator. In the lower court appellants sought to depose Mr. Freedman as to ". . . the considerations, the deliberations and the factors that went into the creation . . ." of the reapportionment plan. [A-27]. The lower court, finding that this proposed inquiry into the "motives" and "thought processes" of the Commission [A-42] was contrary to the legislative privilege afforded Mr. Freedman, entered a protective order barring appellants from so proceeding. [A-19 through A-48].

NOTE 5 — *(Continued)*

wealth. The commission shall act by a majority of its entire membership.

The Commission consists of the Senate Majority Leader, Senate Minority Leader, House Majority Leader, House Whip and a Chairman selected by the other four members. PA. CONST., Art. II, §17(b).

6. PA. CONST., Art. II, §17(c).

7. PA. CONST., Art. II, §17(e).

8. In that case, this Court concluded that the Supreme Court of Virginia, insofar as it promulgated rules for the Bar of Virginia, was a legislative body:

"[I]n this case the Virginia Court claims inherent power to regulate the Bar, and as the dissenting judge below indicated, the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code."

Appellants argue that this application of leglislative privilege to the Commission's Chairman poses novel and substantial questions that have not been addressed by this Court. To the contrary, the lower court's determination is in full accord with the letter and purpose of the privilege traditionally accorded state legislators as reflected in the pronouncements of this Court.

This Court has held that under the federal common law state legislators are entitled to absolute immunity from civil suit for actions which fall within "the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The scope of this immunity protects against inquiry into the motivations or purposes behind a legislator's actions, for even an ". . . unworthy purpose does not destroy the privilege." *Id.* at 377. The privilege bars any inquiry ". . . into acts that occur in the regular course of the legislative process. . . ." *United States v. Brewster*, 408 U.S. 501, 525 (1972).[9]

In *Supreme Court of Virginia v. Consumers Union of the United States Inc., supra*, a consumer group filed suit against the Virginia Supreme Court pursuant to 42 U.S.C. §1983 challenging that court's disciplinary rules governing the conduct of attorneys. The Virginia Supreme Court promulgated these rules by virtue of its inherent authority to regulate and discipline attorneys and

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9. *Accord, United States v. Helstoski*, 442 U.S. 477, 489 (1979). In these cases, this Court was construing the operation of the federal Speech or Debate Clause. U.S. CONST. Art. I, §6. The Court has noted, however, that the federal common law legislative immunity announced in *Tenney v. Brandhove, supra*, has generally been equated to that accorded Congressmen under the Constitution. *Supreme Court of Virginia v. Consumers Union of the United States, Inc., supra*, 446 U.S. at 732. The principles underlying the two immunities are identical, namely, ". . . to insure that the legislative function may be performed independently without fear of outside interference." *Id.* at 731. *Accord, Sweeney v. Tucker*, 473 Pa. 493, 505, 375 A.2d 698, 703 (1977). Accordingly, the holdings of this Court with regard to the federal Speech or Debate Clause should apply equally to federal common law legislative immunity.

by virtue of specific statutory authority to do so. In that capacity, the Virginia Supreme Court was held to be entitled to full legislative immunity. *Id.* at 734. Accordingly, insofar as plaintiffs' suit was directed toward actions taken in their legislative capacity the dismissal of plaintiff's action against the Virginia Supreme Court and its Chief Justice was upheld.

The source of the immunity recognized by this Court in that case was federal common law, ". . . an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Id.* at 732. The scope of immunity granted under the Speech of Debate Clause was analyzed in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975):

> The applicability of the Clause to private civil actions is supported by the absoluteness of the term "shall not be questioned," and the sweep of the term "in any other Place." In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves."[10]

The activities which are entitled to the protection of legislative immunity are those which are part of the deliberative and communicative process by which members participate in proceedings resulting in the creation of legislation. *Gravel v. United States*, 408 U.S. 606, 625 (1972).[11] The appellants' proposed inquiry of Mr. Freedman concerned the factors and motives behind the final reapportionment plan, a law of the Commonwealth of Pennsylvania. As such, it falls squarely within the scope

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10. 421 U.S. at 503.

11. *Accord, Eastland v. United States Servicemen's Fund, supra*, 421 U.S. at 503-504 and *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

of the privilege which has consistently been recognized by this Court.

Appellants nonetheless argue that this well-established law of legislative immunity should not be applied in a case such as this where "intent" is an element of proof. Yet, this Court has held that the privilege controls even where intent must be proved.[12] In any event, the inability of a voting rights plaintiff to depose those taking official action with the aim of obtaining direct evidence of a discriminatory intent is not the death knell of such actions. As this Court recognized in *Rogers v. Lodge*, ____ U.S. ____, No. 80-2100 (July 1, 1982), ". . . discriminatory intent need not be proven by direct evidence." The unalterable truth remains that appellants failed to produce *any* evidence of discriminatory intent.

Reapportionment in Pennsylvania is a legislative matter, a matter required to be considered and decided by the Legislative Reapportionment Commission.[13] In this instance, the Commission met repeatedly to achieve the difficult task of reapportionment. It heard and considered the various views of approximately three hundred citizens and ultimately, one plan was adopted by the Commission members as the final reapportionment plan for Pennsylvania. [A-7 through A-8]. That plan is now the law of the Commonwealth.

This process represents the very essence of what this Court has referred to as "legitimate legislative activities."[14] It is this process which the federal Speech or Debate Clause, and the federal common law legislative immunity were designed to foster by prohibiting extra-legislative questioning regarding the motivations and purposes behind a legislator's actions.

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12. *United States v. Johnson*, 383 U.S. 169, 184-185 (1966).

13. *See, Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("We have repeatedly recognized that state reapportionment is the task of the local legislatures or of those organs of state government selected to perform it.") and *In re Reapportionment Plan for the Pennsylvania General Assembly, supra*, 442 A.2d at 665.

14. *Tenney v. Brandhove, supra*, 341 U.S. at 376.

Appellants argue further that "extraordinary circumstances" such as those articulated in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977) justified the proposed inquiry of Mr. Freedman. Appellants were granted every opportunity in the lower court to prove such "extraordinary circumstances" and failed to meet their burden. [A-26 through A-28]. In *Arlington* this Court defined such "extraordinary circumstances" as would warrant inquiry into the purposes of official action as ". . . proof that a discriminatory purpose has been a motivating factor in the decision." *Id.* at 265-266. Appellants failed to introduce any evidence whatsoever to demonstrate that a "discriminatory purpose" had been a motivating factor behind the Final Plan. To the contrary, as observed by the lower court:

> Whatever the Commission's reasons for drawing a preliminary plan, without a district of more than 15% Hispanic population, there remains the unalterable truth that the Commission revised that plan to provide for a district with a significantly greater proportion of Hispanic voters equal to 40% of the district's population. It is more reasonable to infer from such a marked upward adjustment that the Commission considered the views of Hispanics and did what it could to accommodate them, than it is to infer that the Commission embraced the views of defendant Glancey. [A-16].

Moreover, as appellants concede [A-21], even if "extraordinary circumstances" such as would warrant inquiry into the "purpose of the official action . . ." are shown, it would not necessarily negate the privilege to which a legislator is entitled. *See, Arlington Heights, supra*, 429 U.S. at 268.

Finally, appellants rely upon this Court's holding in *United States v. Gillock*, 445 U.S. 360 (1980) in an attempt to negate the privilege. In that case, this Court

held that the privilege did not apply in a federal criminal action brought against a state legislator where ". . . important federal interests are at stake, as in the enforcement of federal criminal statutes. . . ." *Id.* at 373. No similar overwhelming federal interest exists in this case. In *Supreme Court of Virginia v. Consumers Union of the United States, Inc., supra*, this Court recognized the distinction between federal criminal and civil actions against state legislators and reaffirmed the broad privilege accorded state legislators in a case such as the present:

> Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under §1983 to that accorded Congressmen under the Constitution.[15]

An alleged "need" to inquire into legislative acts and motivations is not alone sufficient reason to jeopardize the principles underlying legislative immunity. *See e.g., Tenney v. Brandhove, supra*, 341 U.S. at 378 ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies."). The privilege was properly applied to bar inquiry of the Commission's Chairman. The purpose of the privilege has been served. As stated by James Wilson, an influential member of the Committee of Detail responsible for the federal Speech or Debate Clause:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the

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15. 446 U.S. at 733.

exercise of that liberty may occasion offence. II Works of James Wilson (Andrews ed. 1896) 38.

CONCLUSION

The Commission respectfully submits that the questions upon which this cause depends are not novel and are so unsubstantial as not to require further argument. The Commission respectfully moves the Court to affirm the judgment entered in this cause by the three-judge court in the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

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